Filed 6/24/19 Wilson v. Specialized Loan Service CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

BRYAN WILSON, Plaintiff and Appellant, v. SPECIALIZED LOAN SERVICING, LLC, Defendant and Respondent.	C085705 (Super. Ct. No. PC20150149)

Plaintiff Bryan Wilson sued several banks and mortgage loan servicers for damages and equitable and injunctive relief relating to denials of his loan modification applications and the resulting foreclosure proceeding on his permanent residence. This appeal deals with the judgment dismissing Wilson's claims against only one of the mortgage loan servicer defendants -- Specialized Loan Servicing, LLC (Specialized). Wilson argues the trial court erred in sustaining Specialized's demurrers to his first and second amended complaints as to his negligence cause of action and the derivative

violation of Business and Professions Code section 17200 (the unfair competition law) cause of action.[1]

The sole issue on appeal is whether Wilson alleged sufficient facts to plead a negligence cause of action against Specialized relating to its handling and processing of Wilson's loan modification applications. We conclude he did not and affirm.

PERTINENT FACTUAL ALLEGATIONS

Wilson purchased a home in El Dorado Hills in May 2005. He financed the purchase, in part, with a mortgage through defendant Bank of America, N.A (Bank of America). In October 2008, Wilson requested to modify his loan due to loss of income. A Bank of America representative told Wilson that "in order to be considered for a loan modification he had to be 90 days delinquent." "Based on this representation, [Wilson] did not make any further monthly payments in order to become 90 days delinquent and thus become eligible for a modification." He submitted several loan modification applications to Bank of America, all of which were denied.

On March 16, 2010, Bank of America "issued an Assignment of Deed of Trust purporting to assign the said Note and Deed of Trust" to defendant Wells Fargo Bank, N.A. (Wells Fargo). A notice of default was recorded the next day.

Following the assignment to Wells Fargo, Bank of America and/or BAC Home Loan Servicing, LP (BAC) became the servicer of the loan. In May 2010, Wilson and BAC entered into a loan modification agreement. Wilson made payments under the

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[1] The trial court sustained Specialized's demurrer to the negligence, breach of the implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, equitable accounting, and intentional infliction of emotional distress causes of action in the first amended complaint without leave to amend and sustained its demurrer to the promissory estoppel and violation of Business and Professions Code section 17200 causes of action with leave to amend. The trial court later sustained Specialized's demurrer to the second amended complaint in its entirety without leave to amend and entered judgment in favor of Specialized.

agreement until November 2010, when the automatic withdrawals from his checking account stopped and he was notified Wells Fargo refused to accept the payments because it did not consent to the loan modification agreement. Wilson disputed the payment refusal to no avail.

In May 2011, Bank of America or BAC informed Wilson that Wells Fargo agreed to approve the loan modification agreement at a slightly higher monthly payment; however, Wilson had to make a $15,250 lump sum payment for past due amounts. Wilson objected to the lump sum payment and tried to reach a compromise allowing him to roll the $15,250 into the principal. In the meantime, Wilson made two payments in the revised amount. After making the second payment, a Bank of America representative told Wilson the $15,250 would not be rolled into the principal and his only option was to submit a new loan modification application -- which Wilson did around August 2011.

Around March 2012, Bank of America denied Wilson's application on the ground he had defaulted on the written modification agreement. Wilson disputed the denial and met with a Bank of America agent in early August 2012, who told him "to submit another new modification application and package which would be approved because it was a servicing error that caused the previous rejection." Shortly thereafter, however, Wilson received a notice of acceleration of his loan. Wilson disputed the notice of acceleration and, fearing foreclosure, made two payments in an amount provided by a Bank of America agent. Bank of America returned the two payments in October 2012, stating it could not accept a partial payment.

In the same month, Wilson was informed his loan servicing was being transferred from Bank of America to Specialized. Wilson told Specialized he "already had in place a written Loan Modification Agreement and explained all of the circumstances and events thereafter as described [in the complaint] arising from [Bank of America's] fault in rejecting the [agreed-upon] payments." A Specialized agent told Wilson he would have to submit a new application.

Wilson submitted a modification application in December 2012, which Specialized denied on February 25, 2013. The letter from Specialized stated: "We are unable to create an affordable payment equal to the allowable percentage of your reported monthly gross income without changing the terms of your loan beyond the allowable parameters of the program." Wilson called Specialized and was informed by an agent that Specialized "did not take into account the income Wilson had listed in the form of draws from his company." She advised Wilson to resubmit his business income information, which Wilson did.

Specialized confirmed denial of Wilson's application in a letter dated April 4, 2013. The letter was sent "in response to [Wilson's] request for a second independent review of the denial of [his] loan modification." The letter stated, in pertinent part: "The findings of the initial denial letter have been validated using the documentation provided. Therefore, you are not eligible for the loan modification for which you applied. Please contact our office so we can determine if you may qualify for another loss mitigation program." In a subsequent phone conversation, a Specialized agent explained the underwriter would not accept the business income information without a profit and loss statement.

On May 1, 2013, Specialized sent Wilson a letter advising him that his home was being referred to foreclosure. On May 6, 2013, however, Specialized sent Wilson a letter requesting income information in connection with an ongoing review of his modification application. Three days later, Specialized sent Wilson another letter -- this time providing notice of default and notice of intent to foreclose. Wilson sent Specialized the income information requested in the May 6 letter within a couple of days of receiving the request.

On May 28, 2013, Specialized sent Wilson a letter stating "your home is at risk of foreclosure" but a loan modification was an option. Wilson submitted another modification application in response to the letter, which Specialized denied on June 11,

2013. During a phone conversation with a Specialized agent, the agent told Wilson she did not understand why the underwriter refused to accept the documented business income and a " 'workout agent' " would contact him. Specialized sent Wilson a letter on July 8, 2013, requesting additional documents; Wilson provided the documents and received a denial letter dated August 13, 2013 "on the grounds an affordable payment could not be determined." Wilson called Specialized again and learned the application was denied based on inadequate income because his business income was not being accepted.

Wilson sent Specialized a letter on August 14, 2013, "disputing the denial of the modification . . . and attached thereto the documents in support of the wrongful denial." In that letter (attached to the complaint as exhibit 22), Wilson wrote he spoke with Minnie, a Specialized agent, on August 13, 2013, and she "informed [him] that [his] loan modification was declined for inadequate income." He further wrote: "This is inaccurate on several counts and it is clear that the hardship letter that [Specialized] requested was disregarded when considering my note modification, the original hardship letter dated 2/21/2013 is included. [¶] In this hardship letter if read, you will find that only the income required by [Bank of America] to approve my note mod[ification] was provided. Additional income of $19k year to date and what should be $40k by the end of 2013 can be shown. This income is from real estate sales which I resumed doing this year. [¶] . . . In the coming weeks I will rebuild my income file to show the additional $2000-$3000/month and also update my RMA."

Specialized sent Wilson a letter on August 28, 2013, "in response to [his] request for a second independent review of the denial of [his] loan modification." The letter stated, in pertinent part: "The findings of the initial denial letter have been validated using the documentation provided. Therefore, you are not eligible for the loan modification for which you applied. Please contact our office so we can determine if you may qualify for another loss mitigation option. . . . [¶] We are unable to create an

affordable payment equal to the allowable percentage of your reported monthly gross income without changing the terms of your loan beyond the allowable parameters of the program. We have no evidence of any change to the income on the account."

Wilson sent Specialized another letter on September 23, 2013, "demanding [Specialized] accept his documented business income information." In that letter (attached to the complaint as exhibit 24), Wilson wrote in pertinent part: "On August 13th 2013[,] Minnie (Emp#10982) informed me that my loan modification was declined for inadequate income and excessive forbearance. Since receiving this information[,] I have *now* included all of my household income which increase my monthly income by 28% to $6867. Prior to this denial, [Specialized] had refused to use the commission income from my full[-]time position which lead to two denials leading up to August when the accurate W-2 income was finally recognized. I am *now* adding just over $1500/ month from my part time real estate position. [¶] The reason that only my [River City Waste Recyclers] income was include[d] is that last October 2012 [Bank of America] had approved my note mod[ification] with just income from my full[-]time position at River City Waste Recyclers. Since [Bank of America] approved me using this income, it seemed that [Specialized] would do the same when taking over my loan in November 2012. After speaking with different [Specialized] staff they made me aware that [Specialized] does not offer the same loan modification products as [Bank of America] which is why I have been deemed ineligible to keep my home via a note modification with [Specialized]. [¶] . . . . [¶] . . . . I am asking that no foreclosure actions be initiated prior to reviewing all of the past information provided as well as the *new income* and assistance available. Please move my file back into processing *with the attached checks and bank statements* while also considering the funds that Keep Your Home California is offering. I'm confident that when considering all income and assistance available [Specialized] can either reinstate my loan or create an affordable payment so that my family can keep our home." (Italics added.)

In its October 29, 2013, letter, Specialized stated it had "received the updated financial documentation that [Wilson] provided, and the underwriting of the account was re-reviewed on October 11, 2013." Specialized said it was "unable to create an affordable payment equal to the allowable percentage of [his] reported monthly gross income without changing the terms of [his] loan beyond the allowable parameters of the program." A Specialized agent told Wilson that Specialized "did agree with [his] characterization of his income and accepted the income amount set forth by him but still rejected the modification because the principal had now increased by about $100,000 based on payments, interest and penalties that had accrued since October 2010."

At some point in October 2013, Wilson applied for a $100,000 grant under the Keep Your Home California program. Wilson was notified by a Specialized agent in February 2014 that he would receive the grant under the program. The agent explained Specialized would accept the $100,000 toward a reduction of his principal and he would receive modified terms for the balance. In early March 2014, however, Specialized informed Wilson that it could not process the $100,000 grant because the servicing of the loan was being transferred to a new servicer, defendant Nationstar Mortgage LLC (Nationstar). The Specialized agent explained the new servicer would receive the entire file to complete the process, and refused to provide Wilson with a copy of the grant approval. Wilson contacted the Keep Your Home California program and was advised "he would have to start the process all over again with the new servicer." Wilson made no mention of the grant under the Keep Your Home California program following the transfer of his loan's servicing to Nationstar.

The loan servicing was transferred to Nationstar around April 9, 2014. Nationstar informed Wilson he had to "submit a new modification application and that all prior modification applications with prior servicers were not going to be honored or considered." Wilson submitted a new loan modification application on April 16, 2014, and communicated back and forth with Nationstar until December 2, 2014. Nationstar

never issued a decision on Wilson's application. On January 23, 2015, Wells Fargo issued a notice of default "instituting formal non judicial foreclosure proceedings."

As we can best ascertain, Wilson alleged Specialized's rejections of the loan modification applications were wrongful because: (1) his "income per the November 2012 and July 2013 modification applications to [Specialized] was equal to or better than the income [on] which [Bank of America] had based its approval of the said written Loan Modification Agreement back in May 2010"; and (2) Specialized "had no basis either under its own modification program or the government program not to include [his] business income for purposes of the evaluation for a modification" and if his total income "was acknowledged he would have been eligible for and would have received a loan modification, the terms of which he could and would have paid." Wilson further alleged Specialized had "ample time to complete the documents to receive the $100,000 from the [Keep Your Home California] program" and to complete the modification and was negligent in failing to do so. "If [Specialized] had acted diligently[,] the $100,000 would have been received by [Specialized], his principal accordingly reduced and [he would] have been issued a permanent modification of the balance."

In his negligence cause of action, Wilson alleged Specialized owed him "a duty to exercise reasonable care in the review of his loan modification applications once [it] had agreed to consider them." Specialized allegedly breached this duty by failing to review his applications in a timely manner, mishandling his applications by relying on incorrect information, and making material misrepresentations about the status of his loan modification applications. Wilson alleged he was harmed by the inaccurate or untimely communications regarding the status of his applications and the wrongful rejection thereof. The mishandling of his applications "deterred [him] from seeking other remedies to address the default and/or unaffordable mortgage payments, [and caused] damage to his credit, additional income tax liability, costs and expenses incurred and other damages."

DISCUSSION

"To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62.) Wilson argues the trial court erred in sustaining Specialized's demurrer to the negligence cause of action because the complaint set forth sufficient facts demonstrating Specialized owed him a duty of care "in the handling and processing of the subject loan modification applications" and that it breached that duty. He further argues that, because the negligence ruling was in error, the trial court erred in sustaining Specialized's demurrer to the derivative unfair competition law cause of action as well. Specialized argues the judgment should be affirmed because Wilson failed to plead sufficient facts to establish a duty of care and, even if he did, he failed to plead sufficient facts to establish a breach of that duty.

I

Standard Of Review

"A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed." (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1141.) Further, "[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83; accord, *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627 [facts appearing in exhibits to the complaint are given precedence if contrary to allegations in the complaint].)

Wilson must affirmatively demonstrate error and specifically "show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer." (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) "We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained." (*Ibid*.)

"When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

II

Duty Of Care

Lenders, as a general rule, do not owe borrowers a duty of care unless their involvement in a transaction goes beyond their "conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) However, "[e]ven when the lender is acting as a conventional lender, the no-duty rule is only a general rule." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 901.) The question of whether the lender owes a duty of care to the borrower requires the balancing of factors, known as the *Biakanja* factors. (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 945.) The *Biakanja* factors " ' "are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." ' " (*Nymark*, at p. 1098, quoting *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.)

As this court explained in *Rossetta*, "California Courts of Appeal have not settled on a uniform application of the *Biakanja* factors in cases that involve a loan modification." (*Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, 637.) "Although lenders have no duty to offer or approve a loan modification [citations], courts are divided on the question of whether accepting documents for a loan modification is within the scope of a lender's conventional role as a mere lender of money, or whether, and under what circumstances, it can give rise to a duty of care with respect to the processing of the loan modification application." (*Id.* at pp. 637-638.)

In *Lueras*, the Court of Appeal held "a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money" and thus a lender's duty is defined by the loan documents and relevant statutes and regulations, not common law negligence principles. (*Lueras v. BAC Home Loans Servicing, LP*, *supra*, 221 Cal.App.4th at p. 67.) In contrast, in *Alvarez*, the Court of Appeal held that while a servicer has no general duty to offer a loan modification, a duty may arise when the servicer agrees to consider the borrower's loan modification application. (*Alvarez v. BAC Home Loans Servicing, L.P.*, *supra*, 228 Cal.App.4th at p. 948.) Pending guidance from our Supreme Court, this court has followed the reasoning in *Alvarez*, the case more favorable to the borrower, rather than *Lueras*, as this court stated in *Rossetta* -- a case neither party identified nor discussed.[2] (*Rossetta v. CitiMortgage, Inc.*, *supra*, 18 Cal.App.5th at p. 640.)

We begin the duty analysis by "identifying the allegedly negligent conduct by [Specialized] because our analysis is limited to 'the specific action the plaintiff claims the

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[2] Wilson argues Specialized had a duty "in the handling and processing of the subject loan modification applications," as explained in *Alvarez*. Specialized argues the trial court properly followed *Lueras* and rejected *Alvarez* "as a minority view" and, in any event, *Alvarez* is distinguishable because the general rule that a financial institution owes no duty of care to a borrower applies under the facts of this case.

particular [defendant] had a duty to undertake in the particular case.' " (*Lueras v. BAC Home Loans Servicing, LP*, *supra*, 221 Cal.App.4th at p. 62.) Wilson does not assist us in this analysis; he merely directs us to the allegations in the complaint and discusses and recites verbatim various passages from cases he believes are on-point for finding a duty of care. He does not explain *how* his factual allegations give rise to such a duty, as required on appeal. (*Intengan v. BAC Home Loans Servicing LP*, *supra*, 214 Cal.App.4th at p. 1052.)

The allegations are rather confusing but, as we see it, Wilson's negligence cause of action against Specialized appears to be grounded in the following two alleged negligent acts: (1) Specialized's denials of his loan modification applications based on his employment income (when Bank of America previously agreed to modify his loan based on the same information) and its refusal to accept his business income; and (2) Specialized's failure to complete the Keep Your Home California grant transaction after it learned the loan was being transferred to Nationstar.[3]

Specialized's denials of Wilson's modification applications for inadequate income, without more, do not give rise to a duty of care in the review, handling, and processing of his loan modification applications. The true nature of the duty Wilson

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3 While Wilson alleged in a conclusory fashion that all defendants, including Specialized, breached the duty of care in the handling and processing of his loan modification applications by failing to review his applications in a timely manner and making material misrepresentations about the status of his loan modification applications, we find no material factual allegations supporting such conclusions of fact *as applied to Specialized*. (*Brown v. Smith*, *supra*, 24 Cal.App.5th at p. 1141 [we do not accept as true contentions, deductions or conclusions of fact or law].) Further, in his opposition to Specialized's demurrer, Wilson argued his causes of action against Specialized were based on, among other things, Specialized's wrongful refusal to abide by and honor the Bank of America modification agreement. Wilson does not raise this argument on appeal and we see no basis for concluding that Specialized had a duty to abide by the alleged modification agreement between Wilson and Bank of America. Any such argument has been waived.

seeks to impose is tantamount to a duty to approve his applications. Indeed, the "wrongful conduct" of which Wilson complains is the denial of his modification loan applications based on the income he provided, not the manner in which Specialized handled and processed his applications, as in *Alvarez* and *Rossetta*. (See *Alvarez v. BAC Home Loans Servicing, L.P.*, *supra*, 228 Cal.App.4th at p. 945 [plaintiffs alleged lender breached its duty of care by, among other things, failing to review their loan modification applications in a timely manner, foreclosing on their properties while they were under consideration for a modification, misplacing their applications, and mishandling them by relying on incorrect salary information (erroneously basing the denial on income of $2,554.75 whereas the paystubs showed monthly gross income of $6,318.98)]; *Rossetta v. CitiMortgage, Inc.*, *supra*, 18 Cal.App.5th at p. 643 ["The complaint alleges CitiMortgage acted unreasonably by dragging Rossetta through a seemingly endless application process, requiring her to submit the same documents over and over again (including a 'nonexistent' statement of permanent disability income), losing or mishandling documents, misstating the status of various applications, and ultimately denying them for bogus reasons"].)

As this court and other Courts of Appeal have explained, a lender has no duty to approve a loan modification. (*Rossetta v. CitiMortgage, Inc.*, *supra*, 18 Cal.App.5th at pp. 637-638; see also *Lueras v. BAC Home Loans Servicing, LP*, *supra*, 221 Cal.App.4th at p. 67 ["As the *Jolley* court recognized, 'there is no express duty on a lender's part to grant a modification under state or federal loan modification statutes' "], quoting *Jolley v. Chase Home Finance, LLC*, *supra*, 213 Cal.App.4th at p. 903.) None of the cases cited and discussed by Wilson found a duty of care on facts like those presented here.

We note that, reading the complaint in isolation, Wilson alleged Specialized erroneously denied his pre-August 2013 applications relating to his business income because, following Wilson's September 23, 2013, letter "demanding [Specialized] accept his documented business income information," a Specialized agent told Wilson that

Specialized agreed with his characterization of his income and accepted the income amount set forth by him. We need not consider whether such allegations are sufficient to give rise to a duty of care because the allegations are directly contradicted by exhibits 22 and 24 to the complaint -- in statements made by Wilson himself. (*SC Manufactured Homes, Inc. v. Liebert*, *supra*, 162 Cal.App.4th at p. 83 ["[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"]; *Dodd v. Citizens Bank of Costa Mesa*, *supra*, 222 Cal.App.3d at p. 1627 [facts appearing in exhibits to the complaint are given precedence if contrary to allegations in the complaint].)

The letters indicate that, prior to September 23, 2013, the income Wilson submitted to Specialized was his full-time income earned through his employment with River City Waste Recyclers; the same income documentation he had previously submitted to Bank of America. And, Wilson first submitted his business income to Specialized on September 23, 2013. Accordingly, the pre-August 2013 denials were not and could not have been based on Specialized's consideration of Wilson's business income.

We also conclude Specialized owed Wilson no duty of care in the handling and processing of his loan modification applications based on its failure to complete the Keep Your Home California grant process during the month or so between Specialized's learning the loan servicing would be transferred to Nationstar and Nationstar assuming the servicing. First, the alleged negligent act again did not involve the manner in which Specialized handled and processed *the loan modification applications*. Specialized had previously denied all of Wilson's applications for inadequate income; the grant processing was a different and separate transaction.

Second, balancing of the *Biakanja* factors does not support recognition of a duty of care. The first factor (i.e., the extent to which the transaction was intended to affect Wilson) is met because the grant money was plainly intended to affect Wilson. Based on

the allegations, the money would have been applied to the principal and Wilson would have received modified terms for the balance. The second factor (i.e., foreseeability of harm to Wilson), however, is lacking. There are no material facts from which to conclude Specialized could foresee harm to Wilson because the Specialized agent told Wilson that Nationstar would receive the entire file to complete the process. Wilson alleged no other facts from which to draw a foreseeability of harm.

The same is true of the third, fourth, fifth, and sixth factors (i.e., the degree of certainty that Wilson suffered harm as a result of Specialized's action, the closeness of the connection between Specialized's conduct and the injury suffered, the moral blame attached to Specialized's conduct, and the policy of preventing future harm). Wilson alleged a Keep Your Home California agent said he could restart the process again with Nationstar, but he never did. There are no material facts indicating Wilson was harmed by Specialized's failure to complete the grant transaction. Wilson's allegations of alleged harm relate only to Specialized's denials of his loan modification applications.

Wilson did not request leave to amend his complaint and made no showing that the foregoing defects can be cured. (*Rakestraw v. California Physicians' Service*, *supra*, 81 Cal.App.4th at p. 43.) We, therefore, find no reasonable possibility of amendment.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs. (Cal. Rule of Court, rule 8.278(a)(2).)

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Mauro, J.